UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
Rocky Well Service, Inc.,	)	DOCKET NO. SDWA-05-2001-002
	)	
Respondent.	)	
	)	

ORDER GRANTING LEAVE TO AMEND COMPLAINT

Complainant, the United States Environmental Protection Agency ("EPA") has moved to Amend the Complaint originally filed in this matter against Rocky Well Service, Inc. ("Rocky Well" or "Respondent"), seeking leave to include Edward J. Klockenkemper (Mr. Klockempemer"), in his individual capacity, as an additional Respondent. Complainant also seeks amend the Complaint to include new information regarding the status of the Class II underground injection wells cited in the original Complaint. For the reasons detailed below, I hereby grant EPA's Motion to Amend the Complaint Pursuant to 40 C.F.R. §§ 22.14 and 22.16.

Background

This matter is subject to the procedural rules found in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22. The original Complaint filed in this matter names the corporation, Rocky Well Service, Inc., as the Respondent. It alleges violation of Section 1423 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h-2(c), due to the Respondent's failure to subject six Class II wells, identified at Huelsing#1, Zander #1, Lillian Z. Atwood #1, Logan Harrell#1, Reinhold Twenhafel #2 and Wohlwend #6, to the mechanical integrity testing

("MIT") requirements found at 62 Illinois Administrative Code (IAC) § 240.760 and 40 C.F.R. § 147. 701. The Complaint also alleges that the Respondent failed to submit annual monitoring reports in violation of 62 IAC § 240.780(e) and 40 C.F.R. § 147.701. Due to these alleged violations, the Complainant proposed that the Respondent be assessed a civil penalty of One Hundred Seven Thousand, Eight Hundred and Seventeen Dollars ($107,817).

Rocky Well Service, Inc. timely filed an Answer. The matter was docketed and the parties were ordered to confer to determine whether the issues could be narrowed and/or the matter settled. In the course of these discussions, the Respondent supplied the Complainant with copies of its 1994 through 2000 tax returns. In January 2001, the Complainant filed a Motion to Stay Proceedings, expressing the wish to explore the possibility of settling the matter. At the expiration of the Stay of Proceedings, the Complainant filed its Motion to Amend the Complaint and Memorandum in Support of Motion to Amend Complaint Pursuant to 40 C.F.R. §§ 22.14(c) and 22.16 ("EPA Memo"). The proposed additional Respondent, Edward J. Klockenkemper, has filed a Memorandum of E. J. Klockenkemper in Opposition to Complainant's Motion to Amend ("Klockenkemper Memo"). The Complainant has filed Complainant's Reply to E.J. Klockenkemper's Memorandum in Opposition to Complainant's Motion to Amend the Complaint ("EPA Reply Memo").

Legal Standard

Section 22.14(c) of the Consolidated Rules, *Amendment of the complaint*, states that:

> The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days form the date of service of the

amended complaint to file its answer.

Neither the Consolidated Rules, nor the preamble to the July 23, 1999 revisions (64 Fed. Reg. 40138), provide any further guidance as to how this regulation is to be applied. Recognizing the paucity of discussion in determining how to apply this regulation, the Environmental Appeals Board ("EAB") has looked to the Federal Rules of Civil Procedure and pertinent case law for guidance. *In Re: Asbestos Specialists Inc.*, TSCA Appeal No. 92-3 (October 6, 1993), the EAB notes that Fed. R. Civ. P. 15(a) is similar to Section 22.14(c), and is thus instructive in matters regarding amendment of pleadings.

In interpreting Fed. R. Civ. P. 15(a), the U.S. Supreme Court, has held that "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded....If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded the opportunity to test his claim on the merits. In the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc –the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis,* 371 U.S. 178, at 226 (1962).

DISCUSSION

Overview of Proposed Amended Complaint and Arguments against Amendment

As stated above, the Amended Complaint proposes to do two separate things:

1) incorporate updated information concerning the status of the cited wells.

2) add Mr. Klockenkemper, in his individual capacity, as a Respondent.

As to EPA's request to update information concerning the wells, the Klockenkemper Memo does not address this issue, nor can one raise reasonable opposition to EPA's desire to update the Complaint with more current information. There is no assertion the proposed updated information is inaccurate. Justice will be best served by allowing this amendment.

As to EPA's request to add Mr. Klockenkemper as an additional Respondent, Mr. Klockenkemper vigorously opposes the motion and makes three interrelated arguments:

1. He is prejudiced by the timing of the proposed amendment.
2. The amendment is not made in good faith.
3. By its own wording, the Illinois regulation is limited to permittees and Rocky Well is the named permittee.

1. Prejudice due to timing of the proposed amendment and failure of EPA to act with diligence.

Mr. Klockenkemper argues that he will suffer undue prejudice if the motion is granted. Klockenkemper Memo at 2. Mr. Klockenkemper argues that Complainant knew, or should have known, that he was the sole officer and agent for Rocky Well and therefore, EPA did not act with diligence. Klockenkemper Memo at 4. Mr. Klockenkemper argues that for the past twenty years, information about Rocky Well's corporate organization was readily available in the records of the Secretary of State of Illinois. Klockenkemper Memo at 3. Mr. Klockenkemper argues that the Complainant should not be rewarded for failure to act with diligence to ascertain whether any claims may have existed against Mr. Klockenkemper.

EPA asserts that Edward J. Klockenkemper will not suffer any undue prejudice if the motion is granted and Mr. Klockenkemper is added as an additional party. The pending case is

at a relatively early stage. No hearing date has been set, and no pre-hearing exchanges have taken place. EPA argues that there will be no surprise to Mr. Klockenkemper as the violations alleged by EPA against Rocky Well in the original Complaint are the same violations alleged against Mr. Klockenkemper and Rocky Well in the Amended Complaint. EPA Memo at 4. Mr. Klockenkemper was also served as an individual with a Notice of Violation, a Pre-filing Notice letter and a courtesy copy of Complainant's Motion to Stay Proceedings. These documents alerted him to the Complainant's intention of naming him as an additional Respondent. EPA Memo at 4.

EPA argues that the addition of Mr. Klockenkemper as a party will not result in undue delay as he and Rocky Well have intricately related interests and both face liability for the same UIC violations. EPA Memo at 5.

Finally, EPA argues that judicial economy will be served by adding Mr. Klockenkemper as a party. It obviates the need to file a separate complaint against Mr. Klockenkemper, thereby eliminating the need for the presiding officer to adjudicate two separate cases arising from the same violations of the UIC program.

As will be discussed more fully in Section 2, below, EPA also argues that until it obtained further information from the Respondent in the form of tax records, etc., it had no reason to believe that Mr. Klockenkemper should be deemed liable in his individual capacity. EPA asserts that it respected the corporate organization when it filed the initial Complaint only against Rocky Well.

As to Mr. Klockenkemper's arguments that he will be "prejudiced by the timeliness" of the proposed Amended Complaint, I do not agree. The matter is in the early stages of

development and Mr. Klockenkemper has been kept apprized of the issues in his capacity as corporate officer. EPA has the right to file a separate case against Mr. Klockenkemper concerning these alleged violations. I see nothing to be gained by having two separate cases involving the same alleged violations. Given the philosophy that leave to amend is to be liberally construed and administrative complaints are intended to be "easily amended," See *In the Matter of Asbestos Specialists, Inc.*, *supra*, I find that Mr. Klockenkemper's claim of prejudice is not persuasive.

2. The Motion should not be granted because of EPA's lack of good faith.

Mr. Klockenkemper asserts that the Motion to Amend is not made in good faith and will not serve justice. Mr. Klockenkemper states that the corporate status of Rocky Well was well known prior to the time of filing the initial complaint. Mr. Klockenkemper reports that Rocky Well was incorporated in the State of Nevada in 1982, and granted authority to conduct business in Illinois. Documents filed as early as 1982, clearly list Mr. Klockenkemper as the sole officer and agent of the corporation. EPA allegations of violation of the UIC program against Rocky Well began in September 1995. Mr. Klockenkemper argues that EPA knew or should have known of Klockenkemper's position well before the filing of the Motion to Amend. Mr. Klockenkemper argues that it is disingenuous for the Complainant to assert that it was "only after Rocky Well filed its Answer, U.S. EPA learned that Edward Klockenkemper was the President, Secretary, Treasurer and Agent who made the business decisions for Rocky Well." Klockenkemper Memo at 3.

Mr. Klockenkemper questions EPA's motive in deciding to file against him at this time, noting that EPA only made the decision after it had evaluated the Rocky Well tax returns and

determined that the corporation had raised an ability to pay issue. Klockenkemper Memo at 6. "The timing of the request to stay the proceedings, some three months after tax returns were provided, gives rise to the inference that the decision to seek personal liability is taken for reasons other than the discovery of new information, particularly because the Complainant addressed notices to Klockenkemper as President of Rocky Well, in advance of its filing the initial complaint." Klockenkemper Memo at 6.

EPA strongly disagrees with Mr. Klockenkemper's assertion that EPA did not act with diligence or acted in bad faith because it did not investigate claims against him and/or name him as an additional Respondent in the initial Complaint. EPA argues that it was not duty bound to investigate all possible claims against Mr. Klockenkemper prior to filing the initial Complaint. EPA asserts that it timely moved to amend the Complaint, as it was only after Rocky Well filed its Answer that it learned that Edward J. Klockenkemper, was the President, Secretary, Treasurer and Agent who made the business decisions for Rocky Well and that Edward J. Klockenkemper was the individual who performed well maintenance and operational activities at the wells. EPA Memo at 2.

EPA asserts that it respected the corporate status of Rocky Well by not initially assuming an inextricable relationship between the corporation and Mr. Klockenkemper. In fact, EPA argues that "it would have been bad faith for the Agency to initially presume that a closely-held corporation, such as Rocky, is suspect and that its individual corporate officers must be investigated before the filing of an initial complaint, and/or named in the complaint, merely because it is a closely held corporation." EPA Reply Memo at 2. EPA argues that, to the contrary, it was a sign of good faith that the initial Complaint was addressed solely to the

corporate respondent.

EPA argues that it gave the Mr. Klockenkemper every opportunity to attempt to settle the matter in a straight forward manner without the distraction of litigation concerning the addition of a further respondent. EPA asserts that the timing of the Motion to Amend the Complaint related to attempted settlement, not ill motive.

I find that failure to initially name Mr. Klockenkemper in his individual capacity as a respondent was not bad faith. Given the corporate status of Rocky Well, it was reasonable for EPA to initially assume that responsibility for the alleged violations was limited to the corporation. Only when EPA obtained additional information concerning Mr. Klockenkemper's activities in regard to Rocky Well, did EPA have a basis to cite Mr. Klockenkemper in his individual capacity. See *In the Matter of Jerry L. Korn and Dairy Health,* Docket FIFRA 10-2001-0061 (July 31, 2001); *In the Matter of Safe & Sure Products Inc. and Lester Workman*, Docket I.F. & R. 04-907003-C (June 26, 1998).

3. Futility of adding Mr. Klockenkemper in his individual capacity as 62 IAC 240.10 regulates "permittees" and Mr. Klockenkemper is not the permittee.

Mr. Klockenkemper argues that the Motion to Amend the Complaint is futile because the regulations being enforced by EPA, Illinois Administrative Code (IAC) Title 62,[1] require only

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[1] Section 1421 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h, requires that EPA promulgate regulations which include inspection, monitoring, recordkeeping and reporting requirements, for State underground injection control ("UIC") programs that prevent the endangerment to drinking water sources by underground injection..... Upon receipt of EPA's approval of its proposed UIC program, the State may implement a Federally enforceable UIC program in that State and obtain primary enforcement responsibility for that program, (a concept called "primacy").

On March 3, 1984, pursuant to Section 1425 of the SDWA, 42 U.S.C. § 300h-4, EPA approved the State of Illinois' UIC program for Class II wells in Illinois. See 40 C.F.R. §

the permittee to take actions to comply with the UIC regulations. Mr. Klockenkemper argues that, unlike the broad definitions in the SDWA, the 62 IAC 240.10 definition of permittee does not include agents, servants, employees or officers of a permittee. Klockenkemper Memo at 4. Mr. Klockenkemper argues that words are to be given their ordinary meaning and that EPA cannot expand, by reference to the general terms the federal SDWA, the obligations of the specific Illinois regulations. As both parties agree that the permittee is Rocky Well, Mr. Klockenkemper argues that there is no regulatory basis to assess liability against him, individually, for any alleged violations. Klockenkemper Memo at 4. Mr. Klockenkemper argues that he is not an appropriate respondent and that any action that seeks to impose personal liability on him is prejudicial to him and futile. Klockenkemper Memo at 6.

EPA argues that it is of little consequence that Mr. Klockenkemper is not the formal permittee for the wells because "a corporate officer may be held liable, in civil, as well as criminal actions, for wrongful acts of the corporation in which he participated." *In the Matter of Sunbeam Water Company Inc.*, et al., Docket No. 10-97-0066-SDWA (October 28, 1999). EPA Reply Memo at 4.

Mr. Klockenkemper distinguishes *Sunbeam* by stating that the Idaho regulations EPA was attempting to enforce in that case specifically included "a person, company corporation, association or other organizational entity that holds legal title to the public water system... and/or

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147.701. The UIC program requirements set forth in Title 62 of the Illinois Administrative Code, constitutes the "applicable underground injection control program," as defined by 40 C.F.R. §§ 144, 146.5, and Section 1422(d) of the SDWA, 42. U.S.C. § 300h-1(d), for the State of Illinois.

is ultimately responsible for the public water system operation. IDAPA 58.01." Klockenkemper Memo at fn.4.

My reading of *Sunbeam* is that the EPA Administrative Law Judge ("ALJ") looked to standard hornbook principles concerning corporate law. The decision states that, "A corporate officer may be held liable, in civil as well as criminal actions, for wrongful acts of the corporation in which he participated." 18 Am. Jur. 2d § 1877. However, it is not necessary to address the Congressional intent in formulating the SDWA definition of "person," since both individual Respondents in this case are liable under the ordinary application of corporate law principles cited above." *Sunbeam* at 7. The reasoning the ALJ applied in *Sunbeam* is applicable here, as well. Without even addressing the issue of the interplay between the SDWA definition of "person" and the IAC definition of "permittee," EPA should not be precluded, at this stage of the proceeding, from attempting to prove that Mr. Klockenkemper is liable based upon standard principles of corporate law. EPA is attempting to "pierce the corporate veil." Mr. Klockenkemper will have ample opportunity to raise the corporate status and his actions as affirmative defenses in his Answer to the Amended Complaint. It will become a question of fact to be developed in administrative record. *In the Matter of Jerry L. Korn & Dairy Health*, *supra*.

Leave to amend a complaint is futile if the complaint would not survive a motion to dismiss or if the claim is frivolous. *Becker v. University of Nebraska,* 191 F.3d 904, 908 (8th Cir. 1999); *Cowles v. Yesford,* 2001 U.S. Dist. LEXIS 1662 *8 (S.D.N.Y. 2001). In this matter, the Complainant sets forth allegations which are not frivolous and are sufficient to constitute a colorable claim against Mr. Klockenkemper. For these reasons, I find that it would not be futile for EPA to amend the Complaint to add E.J. Klockenkemper as an additional Respondent.

Conclusion and Further Schedule

EPA's proposed amendments are not futile and do not stem from bad faith or dilatory motive, there is no danger of undue delay or prejudice to the Respondents and there have been no prior attempts to amend the Complaint in which EPA could have sought these proposed additions to the Complaint. For these reasons, I hereby grant EPA's Motion to Amend the Complaint to include Edward J. Klockenkemper as an additional Respondent, and to include new information regarding the wells.

EPA shall formally file the Amended Complaint by **February 20, 2003.**

A conference call is hereby scheduled for **April 1, 2003,** at 10:00 AM, Central Time. It will be initiated by the undersigned.

SO ORDERED.

February 6, 2003

Regina M. Kossek
Presiding Officer

IN THE MATTER OF Rocky Well Service, Inc., Respondent
Docket No. SDWA-05-2001-002

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Leave to Amend Complaint, dated February 6, 2003, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk
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Dated:

By: _____
Darlene Weatherspoon
Secretary